

No. 87-1796

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L. J., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are social workers deprived of the defense of qualified immunity and subject to private actions for damages under 42 U.S.C. § 1983, because the foster care funding provision of the Social Security Act enacted in 1961 "clearly established" legal duties enforceable by suits against them for alleged breaches of that Act?

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BRIEF FOR RESPONDENTS IN OPPOSITION
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Respondents L.J., P.G., O.S., M.S. and C.S. respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

In the complaint filed in this action (as amended), the five children who are respondents here sought declaratory and injunctive relief on behalf of themselves and a class of children in foster care under the custody of the Baltimore City Department of Social Services. The

district court granted a preliminary injunction on behalf of the class on July 27, 1987, and the parties submitted to the trial court a proposed consent decree settling the equitable claims in the case on April 25, 1988. A fairness hearing on that settlement is to be held on July 18, 1988.

The named plaintiffs also sought, individually, damages for injuries that they had suffered while in the custody of the Baltimore City Department of Social Services.

The children had been removed from the homes of their parents because of parental abuse and neglect or inability to care for the children. Appendix at 25-27. They were placed in foster homes by the city agency in order to receive substitute care and supportive and rehabilitative services. Id.

The children allege that they suffered severe injuries while in the foster care program of the city agency. The defendants placed them in foster homes which defendants failed to screen and supervise adequately to determine their appropriateness and safety. The children were physically and emotionally abused in those homes. There was sexual abuse of very young children and repeated brutal beatings. Despite receiving reports from doctors, school personnel, and others that the children were being abused and neglected in the foster homes, defendants did not act to remove them from these homes. Defendants did not report the homes for investigation by the appropriate law enforcement agency. Several of the children remained in these abusive foster homes for years, never or infrequently visited by an

employee of the city agency. Defendants provided the plaintiff children little, if any, medical or mental health care. Appendix at 50-112.

In the case of P.G., for example, the city agency requested from and was granted by the juvenile court custody of two-week old P.G. because of the failure of her mother to provide necessary medical care for P.G.'s older siblings. P.G. was then placed by the city agency in one of its foster homes, where she received little supervision or medical care. Ten years later, she was still in the agency's custody and was blind in one eye from a curable eye disease that went untreated. Appendix at 108-117. In the case of M.S., the city agency was granted custody of her because she was sexually abused in her

mother's home. The agency placed her in one of its foster homes where she was sexually abused by the foster father. Appendix at 88-89.

The children allege that the injuries they sustained occurred "because of the willful and intentional acts, policies and omissions, or gross and wanton negligence, or deliberate indifference of the defendants." Appendix at 143.

The children sued the Baltimore City Department of Social Services, officials and employees of that agency and officials of the Maryland Department of Human Resources, in their official and personal capacities. The foster care program in Maryland is financed through federal appropriations made available to the states under the provisions and conditions of the Social Security Act, 42 U.S.C. §§601, et seq.

On January 30, 1985, the city and state defendants jointly filed a motion "for partial summary judgment on the issue of defendants' liability for damages arising from conduct which occurred prior to 1980." Defendants' Motion for Partial Summary Judgment. They asserted that their constitutional duties to foster children were not clearly established before that year.

The defendants filed no accompanying affidavits to refute any factual allegations of the complaint, but, for purposes of the motion, took those allegations as true. After plaintiffs amended their complaint to add statutory claims for the pre-1980 period, the defendants on October 20, 1986 filed a renewed motion for partial summary judgment, again claiming they were entitled to qualified immunity for pre-1980 acts and omissions.

Defendants argued that their constitutional duties were not clearly established and that federal foster care law was not privately enforceable during the pre-1980 period. On July, 27, 1987, the district court denied the motion for partial summary judgment, holding that defendants "could have been reasonably expected to know that their alleged failure to protect foster children placed by them in foster homes selected by them constituted a violation of plaintiffs' fourteenth amendment rights," and that foster children's federal statutory rights to specified protections were clearly established "prior to 1980 and at all times relevant to these proceedings" and were privately enforceable.

Appendix to the Petition at 64a, 70a.

Defendants appealed to the United States Court of Appeals for the Fourth

Circuit from the denial of their motion and there argued for the first time that they were entitled to qualified immunity for their post-1980 as well as their pre-1980 acts and omissions. The Court of Appeals held that they were not entitled to qualified immunity for their activities during either period since their statutory duties to foster children were clearly established. Because of this holding as to statutory duties, the Court did not reach the issue of when the constitutional duties of the defendants to the foster children were clearly established.

REASONS WHY THE WRIT SHOULD BE DENIED

INTRODUCTION

The question presented as set forth in the petition is very narrow: whether "social workers" are entitled to qualified immunity from damages when

sued under 42 U.S.C. § 1983 for violation of the foster care provision of the Social Security Act enacted in 1961 and repealed in 1980. It involves a repealed provision of law and the liability of only some of the defendants.

This question is not even central to the instant lawsuit and does not merit the granting of certiorari. The claims for damages of the children are not primarily based on this pre-1980 statute. Three of the five children seeking damages were not even in foster care prior to 1980, and the others have claims which arise from post-1980 as well as pre-1980 activities.

Furthermore, the question presented addresses only the liability of "social workers," although the children sued other officials of the state and of the city, including the

directors of the state and city child welfare agencies.^{1/} Petitioners here are apparently only the social worker defendants, but defendants made no attempt to show, and the lower courts did not determine, that social workers of the Baltimore City Department of Social Services were exercising discretionary functions for which they might be entitled to raise qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Although narrowly presenting the issue below and in the Question

^{1/} The Petition nowhere indicates which of the parties below have filed it. The petitioners' phrase "social workers" is presumably not inclusive of all defendants below, but there is no way to ascertain which of the defendants has petitioned for certiorari.

Presented here as involving the pre-1980 law, the petitioners suggest, at other points in their petition, that they wish to raise immunity with respect to foster care provisions enacted in 1980 and now in effect, and to raise the issue of immunity for all of the defendants below, not just the "social workers." Petition for a Writ of Certiorari at 17, 21. However, the question before the Court is limited to that stated in the petition and does not encompass these issues. Supreme Court Rule 21.1(a).

In the body of their petition, the social workers argue extensively that there is no cause of action at all for damages under §1983 for violations of federal foster care provisions. This alleged failure to state a cause of action is not before this Court on an interlocutory appeal, which can raise

only the question of qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 2816 (1985).

Furthermore, the rationale for allowing an interlocutory appeal of a ruling on qualified immunity is a limited one: to save officials the hardship of preparation for and participating in a trial. Mitchell, 472 U.S. 511, 105 S Ct. at 2815 (1985). That purpose would not be served by the granting of a writ in this case. The defendants have never requested a stay, and the parties are proceeding with discovery, which the district court has ordered be completed by December 1, 1988. The trial date is to be set on June 27, 1988.

Even if these deficiencies in the petition are overlooked, there is no issue warranting a grant of certiorari,

as discussed below. There is no split in the circuits on the question presented, nor is there any important, unresolved question of federal law. Supreme Court Rule 17.1.

I. THE COURT OF APPEALS — CORRECTLY APPLIED PRECEDENT FROM THIS COURT IN DENYING THE HARLOW V. FITZGERALD QUALIFIED IMMUNITY DEFENSE IN THIS CASE, AND ITS DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS.

The issue of qualified immunity for pre-1980 acts is extraordinarily narrow. The foster care provision at issue in that period is clear and creates distinct duties. Even assuming arguendo that the question presented in the petition can be said to encompass the foster care provisions presently in effect, it is still not a question warranting the exercise of the Court's discretionary review powers.

The defendants do not dispute that the lower courts applied the

appropriate factors from Harlow v. Fitzgerald, 457 U.S. 800 (1982). They also do not claim that there is a conflict with any decision of another Court of Appeals. They merely raise the issue of whether the Harlow criteria were correctly applied to the particular statutes involved in this interlocutory appeal.

A. Governmental officials are shielded from liability for damages only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. at 818. The Court of Appeals applied this test to the statutes at issue and held that Congress was quite specific and clear in the rights provided. Both the former foster care law and the present

"spell out a standard of conduct, and as a corollary rights in plaintiffs" which were clear to a reasonable person. Appendix to the Petition at 22a.

Section 408 of the Social Security Act, 42 U.S.C. §608, which was repealed and replaced in 1980, required, for each child in federally financed foster care and eligible for services under 42 U.S.C. §§602(a)(10) and 608(a), a plan "to assure that he receives proper care." Act of May 8, 1961, Pub.L. 87-31, § 2, 75 Stat. 76, repealed by the Adoption Assistance and Child Welfare Act of 1980, Pub.L. 96-272, Title I, § 101(a)(2), 94 Stat. 512 [hereinafter cited as "42 U. S. C. §608"]. See Miller v. Youakim, 440 U.S. 125, 138 (1979).

The program was enacted "with the overriding goal of providing the best

available care for all dependent children removed from their homes because they were neglected." Miller v. Youakim, 440 U.S. at 139. See S.Rep.No. 165, p.6; 107 Cong. Rec. 6388 (1961) (remarks of Sen. Byrd). Here, plaintiffs' damage claims arose because the children were not provided minimally adequate care and were subjected to abuse and neglect through defendants' actions and inactions.

"Concerned with assuring that States place neglected children in substitute homes determined appropriate for foster care", and with deterring "indiscriminate foster placements," Congress required that States establish licensing standards and supervise the foster homes. Miller, 440 U.S. at 140. Federal regulations governing the program further specified standard and

licensing requirements. Id.

Assuming that the pre-1980 acts are the only ones at issue in the petition, the duties in pre-1980 law were sufficiently clear to meet the Harlow test. Since 1980, the duties have been as clear and, in some respects, more precise. The defendants seem to concede this, both because they apparently do not raise post-1980 acts in their petition and because they themselves attempt to use the 1980 amendments' focus (and, presumably, clarity) to allege that pre-1980 law was inadequately clear. Petition at 16 n. 10.

The children agree that in the 1980 amendments creating a new Title IV-E of the Social Security Act, "the duty to assure 'proper care' was continued and amplified," as the Court of Appeals stated. Appendix to the Petition at

19a. This is not because the prior statutory mandate was seen as unclear. Rather Congress imposed additional requirements to ensure more effective implementation. 125 Cong. Rec. S15290-91 (daily ed. Oct. 29, 1979) (remarks of Sen. Cranston); 126 Cong. S6941 (daily ed. June 13, 1980) (statement of Sen. Cranston); Lynch v. King, 550 F. Supp. 325, 334, 341 (D.Mass. 1982), aff'd sub nom, Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

For example, in addition to a plan to assure proper care, 42 U.S.C. §§ 671(a)(16), 675(1) and (5), and 627(a)(2)(B), the state is required to establish and maintain standards for foster homes to ensure safety, 42 U.S.C. §671(a)(10), and, whenever it has reason to question the suitability of a foster home because of "neglect,

abuse, or exploitation" of a child, to "bring such condition to the attention of the appropriate court or law enforcement agency." 42 U.S. C. §671(a)(9).

In the lower courts, the officials never disputed that these and other provisions upon which the plaintiffs relied, created clear and specific duties. They made a Harlow argument as to the constitutional claims of the children, alleging that any rights under the fourteenth amendment to safe care while in state custody were not clearly established prior to 1980. As to the statutory claims, they only asserted that there was no private right of action to enforce them. In this Court, they do not suggest how the lower courts erred in concluding that

these duties created enforceable rights.^{2/}

B. The question raised by the defendants is one of remedies: whether the children can ever obtain damages under § 1983 for violations of federal foster care provisions. The inquiry required by Harlow, 457 U.S. 800, on the other hand, is directed at the status of the rights alleged to have been violated, not at the existence of

2/ Defendants try to show as examples of the lack of enforceable rights in federal law provisions of federal foster law which are not and never have been relied upon by the children. Petition at 17, n. 13. This argument as to 42 U.S.C. §§ 627(a)(2)(C) and (b)(3) has no relevance to the case. The children do not assert that each and every clause of the federal law creates an enforceable right.

remedies: "All [a court] need determine is ... whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions...." Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. at 2816.

In asking this Court to grant a writ of certiorari on the issue of §1983 as a remedy (discussed at greater length infra), the defendants are in effect asking this Court to review the lower courts' determination that the children stated a cause of action under §1983 for damages for violations of their statutory rights. That issue is not before this Court: "An appellate court reviewing the denial of the defendant's claim of immunity need not ... even determine whether the plaintiff's allegations actually state a claim." Mitchell, 472 U.S. 511,

105 S.Ct. at 2816.

Furthermore, an order denying a motion to dismiss for failure to state a cause of action is not a final judgment, and therefore is not appealable as of right under 28 U.S.C. §1291, and the lower courts have never determined that an appeal under 28 U.S.C. §1292(b) was appropriate. Allowing the workers to raise the cause of action issue turns the narrow Harlow exception to the final judgment rule into a broad avenue for appealing numerous interlocutory rulings. In any event, as discussed infra, the defendants knew or should have known of the remedies available under §1983.

The officials' §1983 argument distorts the purpose behind qualified immunity and adds another criterion for determining its applicability. Under

their approach, to be liable for damages, governmental officials must not only be aware that they are violating rights but also must be aware that there is an established remedy whereby they will be liable for damages for those violations. Otherwise, officials are free to engage knowingly in violations of foster children's constitutional and statutory rights without fear of liability. Such a reading of Harlow completely defeats this Court's efforts to balance carefully the goals of deterrence of abuse of office and protection of innocent officials. 457 U.S. at 814. Harlow elaborates a test of objective legal reasonableness which provides "no license to lawless conduct" and ensures protection of the "public interest in deterrence of unlawful conduct and in

compensation of victims." 457 U.S. at 819. An offender's lack of knowledge of the remedies available to victims of abuse of office is not a basis for immunity from liability.

C. There is no conflict in the Courts of Appeals or with decisions of this Court on the applicability of qualified immunity when officials are alleged to have violated the provisions of foster care law relied upon by the children: e.g., 42 U.S.C. §§608(f) (repealed), 627(a)(2)(B), 671(a)(9), 671(a)(10), and 671(a)(15). While this issue could conceivably prove to be a common or important one that eventually troubles or splits the circuits, there is no evidence to date that it will become such an issue, and the defendants' "floodgates" arguments (e.g., Petition at 7, 10) are quite exaggerated. This Court typically does

not grant certiorari in a case of first impression involving application of a particular statute, since repealed, based on pure speculation as to the future occurrence of similar litigation.

**II. THIS CASE PRESENTS NO UNRESOLVED
LEGAL ISSUE AS TO ENFORCEMENT OF
THE SOCIAL SECURITY ACT THROUGH
SECTION 1983**

While in some places in the Petition the defendants merely assert the very narrow proposition that the Harlow test was improperly applied below, elsewhere they assert the extraordinarily sweeping proposition that damages can never be obtained for violation of a statute enacted under the spending clause. This proposition does not appear in their Question Presented, is not one properly presented in an

interlocutory appeal, and contradicts the decisions of this Court. Even if this issue can be raised through this interlocutory appeal, the narrow decision below contains no broad holding justifying plenary review in this Court.

The defendants argue that the Court of Appeals' decision has broad ramifications for private enforcement of the Social Security Act. But no unresolved legal issue with regard to the Act was decided. This is not a case raising the issue of whether a court should imply a damage remedy in a statute previously not construed to contain a private cause of action for damages and other relief. The children sued under §1983. The Court below relied upon cases from this Court and another Court of Appeals in holding that particular provisions of the

Social Security Act are privately enforceable through §1983.

Section 1983 states in plain language that persons acting under state law or custom who deprive another of rights secured by federal laws "shall be liable in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983. "[T]he Section 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." Maine v. Thiboutot, 448 U.S. 1, 4 (1980). In Maine, this Court held that an action can be brought under §1983 to redress violations of Title IV of the Social Security Act, the same general title under which the foster children here sue. 448 U.S. at 3.

The decision in Maine cited a line of cases dating back to 1968 in which this Court consistently relied on the availability of a §1983 cause of action to enforce the Social Security Act. Indeed, this Court has relied upon the availability to foster children of a cause of action under §1983 to enforce 42 U.S.C. §608 itself. Miller v. Youakim, 440 U.S. 125 (1979); Maine v. Thiboutot, 448 U.S. at 5.

Although acknowledging that the "right to seek prospective equitable relief to enforce provisions of the Social Security Act..." is established in case law, Petition at 19, the defendants dispute whether the availability of damages under § 1983 for a Social Security Act claim has been clearly established. Yet, there is no precedent of this Court which would suggest that relief under § 1983

can be bifurcated -- that relief is available to redress violations of federal law through an injunction, but it cannot be used to obtain damages or restitution through an action at law or suit in equity. To the contrary, this Court has repeatedly held that damages are available under § 1983. Gomez v. Toledo, 446 U.S. 635, 638 (1980); Owen v. City of Independence, Missouri, 445 U.S. 622, 651 (1980); Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690 (1978).

Given that there are no modifiers to the clause "action at law, suit in equity or other proper proceeding..." in Section 1983, this Court's holding in Maine requires that those actions be available to enforce violations of the

laws.^{3/} 440 U.S. at 4. The officials do not argue that Congress intended, when enacting § 1983, to preclude damages and allow only injunctive relief to remedy violations of federal laws. See Maine, 448 U.S. at 6-7.^{4/} They suggest no other basis for their claim that damages are unavailable to redress violations of clear federal statutory mandates.

This Court has allowed monetary relief under §1983 to remedy violations of federal laws enacted

3/ There are, of course, other protections for some or all officials, such as eleventh amendment immunity, but the issue before the Court does not involve this immunity as the state defendants are sued in their personal capacities.

4/ The Court rejected the argument that Section 1983 was intended only for violations of civil rights laws. Maine, 448 U.S. at 7-8. In any event, the foster care provisions at issue were intended to safeguard the civil rights of foster children. See, e.g., 42 U.S.C. §671(a)(10).

pursuant to the spending clause of the Constitution. In fact, their availability caused this Court to explore the extent of protection afforded to the states by the eleventh amendment. Edelman v. Jordan, 415 U.S. 651 (1974). This term, in Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107 S.Ct. 766 (1987), the Court reaffirmed the availability of §1983 to obtain damages for violations of federal laws enacted pursuant to the spending clause. The officials attempt to distinguish Wright, on the basis that monetary relief took the form of equitable restitution rather than compensatory damages. However, for immunity purposes there is no relevant difference. See Edelman v. Jordan, 414 U.S. at 668.

Furthermore, in Maine, 448 U.S. 1,

the Court held that relief in the form of attorneys' fees is available against governmental officials for violations of the Social Security Act. 448 U.S. at 9. It would be anomalous if pecuniary relief in the form of attorney's fees were available for proving the underlying rights violation but pecuniary relief for the violation itself were not available.

Other courts have recognized — the availability of damages under §1983 for violations of the Social Security Act where there are no eleventh amendment barriers. E.g., Brown v. Porcher, 660 F.2d 1001, 1006-7 (4th Cir. 1983), cert. denied, 459 U.S. 1150 (1983) (damages available against state officers from "a special fund administered separate and apart from all ...funds of the State"); Vargas v.

Trainor, 508 F.2d 485 (7th Cir. 1974),
cert. denied, 420 U.S. 1008
(1975) (damages available when state
officers waive eleventh amendment
immunity).

The officials' reliance on
Guardians Ass'n v. Civil Service
Commission of the City of New York, 463
U.S. 582 (1983), is misplaced. In
Guardians Justice White, in a portion
of the decision in which only Justice
(now Chief Justice) Rehnquist
joined, suggested that the Court
should not imply a private right of
action for damages under Title VI of
the Civil Rights Act of 1964, 42 U.S.C.
2000d. Furthermore, Justice White
qualified even this suggestion by
stating that where the suit is against
state officials for intentional
deprivations of statutory rights, as is
the children's suit here, damages

may well be appropriate. Guardians, 463 U.S. at 597.

The officials' claim that this case raises an unresolved issue as to damages through §1983 for violation of a spending clause statute is thus simply wrong. The decision of the Court of Appeals followed a straightforward application of the factors set forth in Maine v. Thiboutot, 448 U.S. 1, Middlesex County Sewage Authority v. National Sea Clammers Assn, 453 U.S. 1, 19 (1983), and Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107 S. Ct. 766, for determining whether the range of relief under §1983 is available to enforce a federal statute.

One of those factors is whether there is evidence of congressional intent to limit enforcement mechanisms.

The officials cite no evidence, and could cite no evidence, of congressional intent in enacting the foster care provisions themselves to foreclose an action under §1983, in general, or more specifically an action for damages under §1983.

The other factor set out in Middlesex County Sewage Authority v. National Sea Clammers Ass'n, makes §1983 unavailable if the statute at issue does not create enforceable rights. 453 U.S. at 19. But, this Court has consistently recognized the existence of enforceable rights in beneficiaries of the Social Security Act, including the federal foster care program. Miller v. Youakim, 400 U.S. 125. See Rosado v. Wyman, 397 U.S. 397 (1970). The Court of Appeals carefully analyzed the enforceability of the rights created when it examined whether

these rights were clearly established for purposes of the Harlow test. Appendix to the Petition at 18a-22a.

This Court has held that the enforcement mechanisms provided in Title IV of the Social Security Act, in which the provisions at issue are located, were not intended to foreclose a private suit. Rosado v. Wyman, 397 U.S. 397 (1970). It also has relied upon the availability of a private suit to enforce § 608. Miller v. Youakim, 440 U.S. 125 (1979).

That Congress may have acted pursuant to the spending clause in passing the provisions at issue in Rosado, Miller, Maine v. Thiboutot, and this case hardly shows an intent to foreclose a damage remedy under § 1983 against individuals who, as the children allege, intentionally or with

deliberate indifference violate the rights of individuals protected by the enactment.

There may be an eleventh amendment barrier to a damage remedy against the state and its officials sued in their official capacity. Pennhurst State Hospital and School v. Halderman, 451 U.S. 1, 29 (1981).^{5/} However, there is no such barrier where state officials are sued for damages in their personal capacities and the other defendants, a city agency and its employees, are not protected by the amendment. Monell v. New York City Dept. of Social Services of the City of New York, 436 U.S. 658 (1978).

^{5/} Defendants' citation to Pennhurst in their petition seriously distorts the Court's holding in that case, which concerned the existence of statutory rights, not remedies. See Guardians Ass'n v. Civil Service Commission of New York, 463 U.S. at 636-637 (Stevens, J., dissenting).

Nor is there any conflict in the circuits on the availability of Section 1983 to enforce these provisions. The Court of Appeals for the First Circuit has held that § 1983 is available to enforce the federal foster care statutes. Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

The cases cited by the officials raise no conflict. In Lesher v. Lavrich, 784 F.2d 193, 197-198 (6th Cir. 1986), the court held that "relief nullifying a prior state court judgment of child neglect or dependency, or awarding damages in connection therewith, would not be available" in a suit for violation of 42 U.S.C. §627(b)(3), a form of relief and a statutory provision not at issue in this case. In Scrivner v. Andrews, 816 F.2d 261, 264 (6th Cir. 1987), the

court held that federal foster care law "does not create a right to 'meaningful visitation' enforceable under Section 1983," another type of claim unrelated to this case. In Harpole v. Arkansas Dept. of Human Services, 820 F.2d 923, 928 (8th Cir. 1987), the court found no rights under Title IV of the Social Security enforceable by a grandmother whose grandchild died due to the negligence of his mother.^{6/}

^{6/} Similarly, the district court decisions to which defendants point in their petition have no relevance here. They involve children in the custody of their parents and statutory provisions not at issue here. In Re Scott County Master Docket, 672 F.Supp. 1152, 1203-1205 (D. Minn. 1987) (suit raising enforceability of 42 U.S.C. §§627(a)(2)(c) and (b)(3) on behalf of children in parental custody); Jensen v. Conrad, 570 F.Supp. 91, 111-13 (D.S.C. 1983), aff'd. on other grounds, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985) (suit under 42 U.S.C. §620, et seq, alleging failure of governmental officials to protect children from their parents).

The officials' policy concerns that the availability of liability might discourage state participation in the federal foster care program, if valid, should be addressed to the Congress, not to this Court. Tower v. Glover, 467 U.S. 914, 922-923 (1984) (Court does not have "license to establish immunity from Section 1983 actions...").

III. THE DECISION OF THE COURT OF APPEALS IN THIS INTERLOCUTORY APPEAL IS A NARROW ONE WHICH LEAVES UNRESOLVED THE SCOPE OF EVEN THESE OFFICIALS' LIABILITY FOR VIOLATIONS OF FEDERAL FOSTER CARE PROVISIONS

There is no basis for the officials' claims that the Court of Appeals' decision has a "staggering impact on all state officials who administer federal grant programs." The decision is a narrow, interlocutory ruling limited to certain provisions of

foster care law. It makes no broad holdings on liability applicable to other programs.

In arguing that the decision exposes state officials to substantial risks in "numerous statutory schemes enacted in the spirit of cooperative federalism," the defendants minimize the protection afforded to state officials by the qualified immunity defense and by the decision in Middlesex County Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1983).

The decision in this case determines only that rights under four provisions of current foster care law and one repealed provision were clearly established. It does not address other provisions of federal foster care law, nor does it address other federal programs and whether they might create

enforceable rights for Harlow purposes. In addition, a claim under each program must be analyzed separately under the Middlesex criteria. The decision established no new rules for making the determination set out in Harlow, 457 U.S. 800, or the one in Middlesex, 453 U.S. 1.

The defendants also imply incorrectly that the protection afforded by the qualified immunity defense would have relieved all of them of any liability for damages. Even if the Court of Appeals had ruled that the statutory rights were not clearly established, not all of the defendants in this case would have been entitled to immunity. The qualified immunity defense has no relevance to the

Baltimore City Department of Social
Services.^{7/}

Similarly, it has not yet been determined whether the officials and employees of the Baltimore City agency are state or city officials and employees. If they are city officials, they are not entitled to assert a qualified immunity defense when sued in their official capacities, as they have been in this case. Brandon v. Holt, 469 U.S. 464, 472 (1985). In this

^{7/} That department has claimed to be a state agency for the purposes of this case, and if it is correct, it is protected by the eleventh amendment from an award of damages and qualified immunity is irrelevant. However, the district court has not yet determined this issue. If the children are correct and it is a city agency, it is not entitled to assert the qualified immunity defense. Owen v. City of Independence, Missouri, 445 U.S. 622, 630 (1980).

circumstance, even if given qualified immunity in their personal capacities, they would still have to stand trial in their official capacities.

Furthermore, the officials and agency have not shown that they were "performing discretionary functions," Harlow, 457 U.S. at 818, in any of the acts or omissions that the children allege violated their rights, a wide range of illegal actions and inactions, including: placing and maintaining them in unsafe, harmful foster homes; denying them necessary medical care; and leaving them in unsafe placements after the defendants learned of the risks to the children of remaining in the foster homes.

CONCLUSION

For all of the foregoing reasons, respondents respectfully urge this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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